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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS

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Commonwealth Edison Company)

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Petition for approval of delivery services tariffs)
and tariff revisions and of residential delivery)
services implementation plan and for approval)
of certain other amendments and additions to)
its rates, terms and conditions.)

CHIEF CLERK'S OFFICE

ICC Docket No. 01-0423

**COOK COUNTY STATE'S ATTORNEY'S OFFICE'S REPLY TO COMED'S
RESPONSE TO MOTION TO STRIKE TESTIMONY**

Pursuant to Sections 200.190 and 200.610 (a) of the Illinois Commerce
Commission's ("Commission") Rules of Practice, RICHARD A. DEVINE, State's
Attorney of Cook County, on behalf of the Cook County State's Attorney's Office
("CCSAO"), hereby replies to ComEd's response to CCSAO's motion to strike portions
of the direct testimony of ComEd's witnesses and requests that its motion be granted. 83
Ill. Adm. 200.190 and 200.610(a). In support of granting CCSAO's motion, CCSAO
replies as follows:

SUMMARY

CCSAO'S motion to strike should be granted. The Public Utilities Act ("Act")
has unambiguously defined the scope of this proceeding. ComEd's position that the Act
allows consideration of all of ComEd's risks-except for risks associated with its affiliates-
in a delivery services rate proceeding is ridiculous. Under Illinois' restructuring laws, the
Act specifically provides that charges for delivery services shall be cost based and must
only include the costs of owning, operating and maintaining transmission and distribution

facilities. 220 ILCS 5/16-108. Moreover, the Act ensures that if it has any conflicting laws, the restructuring laws prevail. 220 ILCS 5/16-101(a).

CCSAO is not challenging ComEd's claim that it faces higher risks as a provider of last resort. The Commission may eventually make such a finding. The Commission, however, cannot consider such evidence in this proceeding. When determining ComEd's cost of capital in this proceeding, the Commission must set rates for ComEd's delivery *not* generation or bundled services. In some future proceeding, ComEd will have its opportunity to collect all its costs for providing bundled service. 220 ILCS 5/16-103(c), 16-111(h)(i).

Lastly, ComEd fails to show any relevance of its providing bundled service as a risk or cost to its distribution service. As CCSAO has shown at length, ComEd's testimony as to its risks associated with its duty as provider of last resort is only supported by the risks of purchasing generation services. ComEd shows no evidence that its distribution system is affected. CCSAO Motion at 3-6. ComEd's failure to do so results from the fact that Illinois' restructuring laws have eliminated generation risks from delivery services. 220 ILCS 5/16-103, 16-108. The Commission cannot consider the evidence on this issue. Accordingly, CCSAO's motion should be granted.

ARGUMENT

1. The Act clearly defines the scope of this proceeding.

ComEd agrees with CCSAO that the Act defines the scope of this proceeding. However, ComEd states that CCSAO failed to include section 9-230 of the Act as relevant. ComEd Response at 7-8. CCSAO read the Act. Pursuant to section 16-101(a) only when the Electric Consumer Choice and Rate Relief Law of 1997 does not modify,

supplement, or render such provisions inapplicable, will the other provisions of the Act remain fully and equally applicable to the tariffed services electric utilities provide. 220 ILCS 16-101(a). In other words, Illinois' restructuring laws prevail. Therefore, in this delivery services proceeding, the following provisions of the act are fully applicable:

1. The charges for delivery services shall be cost based and must only include the costs of owning, operating and maintaining transmission and distribution facilities. 220 ILCS 5/16-108(c);
2. The Commission can only consider generation services to a limited extent that does not include ComEd's duty as provider of last resort. 220 ILCS 5/16-108(c);
3. ComEd is entitled to all cost components for providing bundled service and may seek full recovery, including any cost of capital directly or indirectly associated with the provision of tariffed services. 220 ILCS 5/16-103(c), 5/16-111(h)(i).

Accordingly, section 9-230 of the Act which ComEd argues allows consideration of all of a utility's risks except for risks associated with unregulated or non-utility activities is no longer fully applicable. The Act limits the consideration of ComEd's risks to delivery services. 220 ILCS 5/16-101(a), 5/16-102, 5/16-103(c), 5/16-108, 5/16-111(h)(i). *See also, Nordine v. Illinois Commerce Commission*, 32 Ill. 2d 421, 428 (1965) ("The rule, not only in this State but in most jurisdictions, is that the plain and unambiguous provisions of the statute do not need construction and the courts cannot read into a provision exceptions or limitations which depart from its plain meaning.").

2. Only Investors' expectations concerning distribution services are relevant.

It is well established in utility regulation that a utility is entitled to earn a return on the value of the property it employs for public convenience similar to investments in other business undertakings with corresponding risks and uncertainties. *Bluefield Waterworks and Improvement Co. v. Public Service Commission*, 262 U.S. 679, 67 L.Ed. 1176 (1923). So the principles of *Bluefield* require that a utility earn a return on the property used for public convenience. *Bluefield*, 262 U.S. at 679. In this proceeding, the Act clearly defines what property is being used for public convenience- delivery services. 220 ILCS 5/16-102, 5/16-108. CCSAO Motion at 2-3. Yet, ComEd cites the *Bluefield* principle without ever applying it to this proceeding. In other words, in this proceeding, the Commission must set a rate that is adequate “to assure confidence in the financial soundness” of ComEd, “to maintain and support its credit,” and “enable it to raise the money necessary for the proper discharge of its public duties” i.e., providing delivery services. *Bluefield*, 262 U.S. at 692-693. As the Illinois Supreme Court has held “the Commission should disallow recovery of any cost of capital in excess of that reasonably necessary for the provision of services. If a utility has included excessive equity in its capital structure, it has inflated the rate of return and its cost of capital.” *Citizens Utility Board v. Illinois Commerce Commission*, 276 Ill.App.3d 730, 746 (1995). Moreover, in a future proceeding, the Commission will set a rate using *Bluefield* principles so that ComEd can discharge its public duty as provider of last resort. *Bluefield*, 262 U.S. at 679, 220 ILCS 5/16-103(c), 5/16-111(h)(i).

Also, it is important to note that the rates established in this proceeding will be charged to customers paying only for delivery services. "The Commission shall enter an order approving, or approving as modified, the delivery services tariff no later than 30 days prior to the date on which the electric utility must commence offering such services." 220 ILCS 16-108(b). So by definition, use of the delivery services tariff means the customer is not taking generation services. Customers will not pay generation costs. On the other hand, the tariff for the provider of last resort will consist of the costs of "bundled electric power and energy delivered to the customer's premises consistent with the bundled electric utility service provided by the electric utility on the effective date of this amendatory Act of 1997." 220 ILCS 5/16-103(c). ComEd seems to suggest that the provider of last resort is the potential for customers switching back and forth between delivery and bundled services. ComEd's Response at 6. This definition is contrary to the provisions of the Act.

Accordingly, the provider of last resort must include generation services. ComEd even agrees that generation related risks should not be considered in establishing returns in this proceeding. ComEd Response at 1. Yet, considering risks related to the provider of last resort is the equivalent of including ComEd's generation assets in its distribution rate base.

3. Granting CCSAO's motion will ensure that the Commission considers relevant evidence.

CCSAO agrees with ComEd that expert testimony is admissible if it will assist the trier of fact to understand the evidence or determine a fact in issue. ComEd Response at 6. ComEd is wrong, however, to present testimony that extends beyond the issue in this proceeding. Culp, Juracek, Peltzman and Thone testify as to risks and costs of

purchasing generation *not* providing delivery services. CCSAO Motion at 2-6. In this proceeding, ComEd must only show that its cost of capital is the reasonable cost of the capital needed to provide delivery services. 220 ILCS 16-108(c); *Citizens Utility Board*, 276 Ill. App. 3d at 746 (rate of return on capital is the reasonable cost of the capital needed to provide the services); *See also, Iowa-Illinois Gas & Electric Co. v. Illinois Commerce Commission*, 19 Ill. 2d 436 (1960). Moreover, since ComEd's duty as provider of last resort has nothing to do with the generation issues that the Act permits the Commission to consider in this proceeding, the testimony is irrelevant and unlawfully expands the scope of this proceeding. 220 ILCS 5/16-108(c)(i)(ii). CCSAO Motion at 3-5. Even the Commission's witness testifies that only ComEd's risks as a transmission and distribution business is at issue. ICC Staff Ex. 5.0 at 42-43.

4. ComEd's testimony serves no other purpose than to prejudice this proceeding.

Assuming for the sake of argument, that ComEd's witnesses are qualified experts¹, then they should be able to testify as to risks associated with delivery services. Other purported qualified experts have done so. *See* ICC Ex. 5.0; COC Ex. 1.0. Therefore, as CCSAO has previously shown, ComEd's testimony only prejudices this proceeding because the Commission cannot fully address it. CCSAO Motion at 5-6. Moreover, the only other purpose the testimony could possibly serve is also prejudicial and illegal. ComEd cannot use its duty as provider of last resort to include excessive equity in its capital structure resulting in an inflated rate of return and cost of capital. *Citizens Utility Board*, 276 Ill. App. 3d at 476.

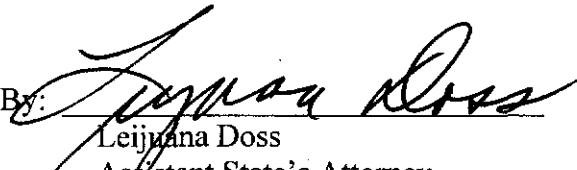
¹ CCSAO reserves all rights to challenge ComEd's witnesses as qualified experts.

CONCLUSION

For all the foregoing reasons as stated in CCSAO's motion and this reply, CCSAO requests this Commission to grant its motion to strike ComEd's testimony.

Respectfully Submitted,

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September 10, 2001

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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NOTICE OF FILING

TO: See Attached Service List.

PLEASE TAKE NOTICE that on this date, September 10, 2001, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Reply to ComEd's Response to Cook County State's Attorney's Office Motion to Strike Testimony in the above-captioned docket.

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CERTIFICATE OF SERVICE

I, **LEIJUANA DOSS**, hereby certify that a copy of the enclosed Reply to ComEd's Response to Cook County State's Attorney's Office Motion to Strike Testimony was served on all parties on the attached list on the 10th day of September, 2001 by hand delivery or U.S. first class mail prepaid.

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